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No. 02-1603

IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, et al.,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did *Mills* v. *Maryland* create a "new rule" within the meaning of *Teague* v. *Lane*, such that it does not apply retroactively to overturn judgments which became final before it was announced?

2. Was the Pennsylvania Supreme Court's decision in this case, that jury instructions which track the wording of the Pennsylvania statute comply with *Mills*, "contrary to or . . . an unreasonable application of clearly established Federal law" within the meaning of 28 U. S. C. § 2254(d)(1)?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition for writ of certiorari in this case. Counsel for petitioners has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The rules of *Teague* v. *Lane* and 28 U. S. C. § 2254(d) are important and independent limitations on collateral review. The Court of Appeals' erroneously narrow interpretation of these rules will needlessly delay enforcement of the death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

June, 2003

Respectfully submitted,

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SUMMARY OF FACTS AND CASE

Over twenty years ago, George Banks "shot fourteen people . . . killing thirteen and wounding one." *Commonwealth* v. *Banks*, 521 A. 2d 1, 3 (Pa. 1987), cert. denied, *Banks* v. *Pennsylvania*, 484 U. S. 873 (1987). The dead included seven children. See *id.*, at 5. He was sentenced to death in 1983. *Id.*, at 3. Despite the absence of any doubt regarding his identity as the perpetrator, see *id.*, at 8, the execution of the judgment has been delayed for two decades of repetitive review, including a direct appeal, two state collateral reviews, two federal habeas petitions, and associated appeals and petitions for certiorari. See *Banks* v. *Horn*, 63 F. Supp. 2d 525, 530-531 (MD Pa. 1999).

In the current round, the United States Court of Appeals for the Third Circuit denied most of his claims, but it vacated the death sentence based on its disagreement with the Pennsylvania

Supreme Court regarding the application of *Mills* v. *Maryland*, 486 U. S. 367 (1988), a precedent established after Banks' sentence became final on direct review. See *Banks* v. *Horn*, 271 F. 3d 527, 540-541 (CA3 2001).

This Court granted certiorari and summarily reversed in *Horn* v. *Banks*, 536 U. S. 266 (2002) (*per curiam*). The *per curiam* opinion confirmed that the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) remains an independent limitation on federal habeas corpus and remanded for determination of whether *Mills* was a new rule. 536 U. S., at 272.

On remand, the Third Circuit panel divided. The two-judge majority held that *Mills* was not a new rule within the meaning of the *Teague* line of cases. *Banks* v. *Horn*, 316 F. 3d 228, 229-230 (CA3 2003). The third judge believed *Mills* was a new rule, but also believed that when a state court waives its procedural default rule and considers on collateral review a claim that could have been raised on direct appeal, the case is not "final" within the meaning of *Teague* until the completion of the collateral review. *Id.*, at 255 (Sloviter, J., concurring).[1] The Commonwealth of Pennsylvania, through the Secretary of its Department of Corrections, has again asked this Court to review the case via a petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals in the present case found the rule of *Teague* v. *Lane* difficult to apply, and it is evident that further instruction is needed. The Court of Appeals' opinion comes close to a catalog of all the ways this Court has said *not* to conduct the *Teague* inquiry: (1) defining "rules" at an excessive level of generality; (2) holding that an outcome is "dictated" because it implements policies of earlier cases, while ignoring countervailing indications of other cases; (3) inadequately surveying the legal landscape, especially ignoring state court opinions; (4) relying on nonconstitutional decisions governing only federal criminal cases, which do not impose those rules on the states; (5) disregarding the close division in the rule-making case itself; and (6) giving no weight to settled practice.

1. Judge Sloviter made no attempt to reconcile her unique definition of finality with the fact that this Court applied the usual definition in identical circumstances in *Sawyer* v. *Smith*, 497 U. S. 227 (1990). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Horn* v. *Banks*, No. 01-1385, pp. 4-5.

On the merits, it is also evident that the rule of *Mills* v. *Maryland* and *McKoy* v. *North Carolina* needs clarification. As Justice Kennedy noted in his *McKoy* concurrence, a rule requiring the jury to be unanimous *either way* on mitigating circumstances is not only permissible but desirable. Courts and legislatures are adopting the "every juror for himself" rule in the mistaken belief that *Mills* and *McKoy* require it. This is contrary to the evenhandedness principle of *Furman* v. *Georgia* and contributes to arbitrariness in capital sentencing.

On the application of 28 U. S. C. § 2254, the Court of Appeals quoted and used a standard of "independent judgment" that was expressly and emphatically rejected by this Court in *Williams* v. *Taylor*.

ARGUMENT

I. The present case illustrates that further guidance is needed on the definition of "new rule."

A. New Rules.

Mills v. *Maryland*, 486 U. S. 367 (1988) involved a standard jury instruction that had been created by a rule of court, promulgated by the highest court of a state on recommendation of its rules committee, used in that state for nearly a decade, and upheld 6-1 by the state high court. *Mills* v. *State*, 527 A. 2d 3 (Md. 1987). Four Justices of this Court also believed the instruction was constitutional. See 486 U. S., at

390 (Rehnquist, C. J., dissenting). Yet the Court of Appeals for the Third Circuit in the present case held that "no reasonable jurist could have reached a different result" than did the bare majority in *Mills*. See *Banks* v. *Horn*, 316 F. 3d 228, 239 (CA3 2003).

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) requires that for *Mills* to be an "old rule," "the unlawfulness of [the instruction must have been] *apparent* to all reasonable jurists" before the *Mills* decision. *Lambrix* v. *Singletary*, 520 U. S. 518, 527-528 (1997) (emphasis added). The Court of Appeals majority in the present case held that a different result in *Mills* would not only have been " 'illogical' or 'grudging' " but "completely untenable." 316 F. 3d, at 242-243. In other words, the committee that drafted the Maryland rule, the court that adopted it, six judges of the Maryland Court of Appeals, and four Justices of this Court were all unreasonable. Such a holding would be worthy of this Court's review by itself. It is even more so in light of the conflicting authorities noted in the petition for certiorari. See Pet. for Cert., part I.

Teague is one of the most important doctrines of this Court's recent jurisprudence, navigating the difficult and murky channel between enforcement of the Bill of Rights and respect for both federalism and the finality of criminal judgments. It has been the subject of numerous decisions of this Court. *Teague* remains important after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 for the reasons stated in Part I-B, *infra*, at 11. To find this doctrine so badly misunderstood and misapplied this late in its development is surprising and, frankly, suspicious. To hold that a rule is not new when it so plainly meets the definition repeated and explained in so many of this Court's decisions smacks of the kind of deliberate evasion that we last saw in the heat of the civil rights struggle of the 1950s and 1960s. Cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964).

Nonetheless, if we generously attribute the Court of Appeals' decision in the present case to misunderstanding rather

than evasion, it is apparent that further instruction is needed. Indeed, the Court of Appeals' opinion itself seems to invite clarification, noting *Teague*'s now 14-year-old statement that "it is 'often difficult to determine' whether a case announces a new rule . . . ." 316 F. 3d, at 233 (quoting 489 U. S., at 301). That task should be considerably easier today, with the numerous examples of what are and are not new rules, just as the law of "probable cause" has acquired content through appellate application, even though it is not governed by rigid rules. See *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996).

The opinion in the present case comes close to a catalog of all the ways this Court has held that federal courts should *not* conduct the *Teague* "new rule" inquiry. They include (1) defining "rules" at an excessive level of generality; (2) holding that an outcome is "dictated" because it implements policies of earlier cases, while ignoring countervailing indications of other cases; (3) an inadequate survey of the legal landscape, especially ignoring state court opinions; (4) relying on nonconstitutional decisions governing only federal criminal cases, which do not impose those rules on the states; (5) disregarding the close division in the rule-making case itself; and (6) giving no weight to settled practice.

1. Excessive generality.

The most common error in *Teague* analysis is defining the pre-existing rule at an excessive level of generality. Habeas petitioners seeking to avoid a *Teague* bar routinely assert that the particular rule they seek to invoke is merely an application of some earlier, sweeping principle. *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) expressly rejected this approach. "But the test would be meaningless if applied at this level of generality."

The Court of Appeals in the present case held that "*Mills* represented merely an application of the well established constitutional rule that the Eighth Amendment prohibits *all* barriers to the sentencer's consideration of any and all mitigation evidence . . . ." 316 F. 3d, at 235 (emphasis added). This

statement is excessively broad in two respects. First, the established Eighth Amendment rule was not that broad in 1987, and it is not that broad today. Second, the specific holding of *Mills* that Maryland's standard instruction violated the rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) was by no means beyond reasonable debate.

On the first point, it simply is not and never has been true that the Eighth Amendment prohibits *all* barriers. Many states, including Maryland, require the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence before it may be considered, and this requirement is valid. See *McKoy* v. *North Carolina*, 494 U. S. 433, 444 (1990) (White, J., concurring); *id.*, at 456 (Kennedy, J., concurring in the judgment). Many states apply their standard rules of evidence to the penalty phase, excluding hearsay, unproven scientific claims, and other unreliable evidence. See, *e.g.*, *People* v. *Phillips*, 22 Cal. 4th 226, 237-238, 991 P. 2d 145, 152 (2000). While there are some constitutional limits on exclusion of defense evidence in the penalty phase, see, *e.g.*, *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) (*per curiam*), this Court has not yet construed the Eighth Amendment to require admission of third-hand gossip or phrenology.

Sawyer would seem to be clear enough on its face that the newness of rules is determined at the specific, nuts-and-bolts level and not in sweeping generalities. The opinion in the present case, however, demonstrates that the point requires reinforcement.

2. Dictated by precedent.

Closely related to the excessive generality problem is the Court of Appeals' evasion of the oft-repeated plain language of *Teague* that a rule is new unless "*dictated* by precedent existing at the time . . . ." 489 U. S., at 301 (emphasis in original). The Court of Appeals opined that if this requirement were applied "narrowly," that is, if it means what it plainly says, it would "unrealistically require courts to have anticipated all future

scenarios in order for later cases to not announce a new rule." 316 F. 3d, at 240. This is hyperbole. No one claims that an old rule must catalog every possibility. A novel but outrageous practice can be a clear violation of established law. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997). What "dictated by precedent" requires is that a judge of a lower court cannot honestly rule the other way without violating the requirements of *stare decisis*, however strongly he or she may disagree with the decision as a matter of policy.

The Court of Appeals' majority's discomfort with "dictated" and its substitution of a different standard is remarkably similar to the argument rejected in *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

> "But the fact that a court says that its decision is . . . 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts."

It was quite debatable at the time of *Mills* whether a requirement of jury unanimity constituted a "barrier" to consideration in violation of *Lockett* or a regulation of the method by which the jury would "consider" the evidence. Indeed, two years after *Mills*, this Court relied on the "what versus how" distinction to hold that a habeas petitioner was seeking to create a new rule when he wanted juries to be able to consider sympathy evoked by his mitigating evidence. "There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider . . . and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990). *Johnson* v. *Texas*, 509 U. S. 350, 372-373 (1993) (quoting *Saffle*), a direct appeal case decided without *Teague* constraints, confirms that the

what/how distinction is alive and well and follows from *Jurek* v. *Texas*, 428 U. S. 262 (1976).

Before *Mills*, a reasonable jurist could conclude that a rule on the jury's vote on mitigating circumstances fell into the "how" category, just as the rule on burden of proof does to this day. A jury that deliberates and votes on whether a factor has been proven *has* "considered" that factor in the ordinary sense of the word. If a State can "structure the consideration," *Johnson*, 509 U. S., at 373, can it not require that all jurors come to an agreement?

The Third Circuit explains its view that the what/how argument "[w]hile perhaps viscerally appealing . . . does not withstand scrutiny." 316 F. 3d, at 245. In other words, it fails on the merits. Perhaps so, but that is not the question. A reasonable jurist in 1987 could have understood *Jurek* to hold that states have substantial authority to structure *how* juries consider mitigating factors, as *Johnson* confirms it did, that this holding of *Jurek* survives *Lockett*, as *Johnson* also confirms, and that jury voting requirements came within this authority. The newness of *Mills* cannot be evaluated by looking only at *Lockett* and ignoring the "tension" between it and *Furman*/*Jurek*. See *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994).

3. Survey of the legal landscape.

The Court of Appeals in the present case limited its survey of the legal landscape to this Court's precedents. 316 F. 3d, at 235, and n. 6. In *Caspari* v. *Bohlen*, 510 U. S. 383, 394-395 (1994), this Court admonished quite clearly that it is error to look only at federal cases and ignore the state court decisions. It is even greater error, in most cases, to look only at this Court's precedents. Of course, if there were a Supreme Court precedent squarely on point, there would be no need to look further. However, in 1987 there was not a single case on the question of what to do when a jury is divided on a finding of a mitigating circumstance. All the relevant Supreme Court

precedents were at a higher level of generality. The relevant pre-*Mills* legal landscape therefore included state court decisions of the questions of whether the *Lockett* rule affected jury voting on the circumstances and, if so, whether instructions like the Maryland form violated the rule.

An adequate survey, at the very minimum, would have to include the Maryland decision in *Mills* itself, *Mills* v. *State*, 527 A. 2d 3, 15 (Md. 1987), and the North Carolina decisions in *State* v. *Kirkley*, 302 S. E. 2d 144, 156-157 (N.C. 1983), and *State* v. *Brown*, 358 S. E. 2d 1, 25 (N.C. 1987) (reaffirming *Kirkley*). With two state supreme courts rejecting *Mills*-type claims and no cases accepting such claims, despite established practice in at least two states,[2] the legal landscape as of 1987 indicates strongly that *Mills* was a new rule.

4. Nonconstitutional precedents.

Only two circuits have held that *Mills* was not a new rule: the Third Circuit in the present case and the Sixth Circuit in *Gall* v. *Parker*, 231 F. 3d 265 (CA6 2000). Both decisions rely on *Andres* v. *United States*, 333 U. S. 740 (1948). Aside from the fact that *Andres* involved the final penalty decision and not a preliminary question of mitigating factors, there is a glaring error in this reliance, which this Court quite specifically addressed in *Sawyer* v. *Smith*, *supra*.

In that case, the petitioner maintained that "*Caldwell* [v. *Mississippi*, 472 U. S. 320 (1985)] applied an old rule" because many state courts had adopted similar nonconstitutional rules. 497 U. S., at 240. The *Sawyer* Court held that the fact that a constitutional rule "is congruent with pre-existing state law" does not prevent it from being a new rule. *Id.*, at 240-241. Similarly, a rule established by this Court for federal courts

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2. We say at least two because we do not believe that instructions such as Pennsylvania's violate *Mills*. See Part II, *infra*. However, if one assumes *arguendo* that Banks would prevail on the merits, then there would be more.

under its supervisory powers or federal statutory interpretation does not engraft that rule on to the Constitution and make it binding on state courts. A decision elevating that rule to constitutional status and striking down contrary state practice is a new rule. See *Goeke* v. *Branch*, 514 U. S. 115, 119 (1995) (*per curiam*) (federal case limiting fugitive dismissal rule was supervisory, not constitutional). The Third and Sixth Circuits' reliance on *Andres* to support the proposition that *Mills* was not a new rule is clear error, contrary to *Sawyer* and *Goeke*.

5. Close division.

A fifth factor given short shrift by the Court of Appeals, see 316 F. 3d, at 243, was the close division in *Mills* itself. This is, in part, due to the majority's excessive generality in the definition of the rule, discussed *supra*, at 5. However, this Court has noted more than once that disagreement in the case in question "suggests that the rule announced there was, in light of this Court's precedents, 'susceptible to debate among reasonable minds.'" *O'Dell* v. *Netherland*, 521 U. S. 151, 159-160 (1997) (quoting *Butler*, 494 U. S., at 415, and citing *Sawyer*, 497 U. S., at 236-237).

6. Established practice.

Finally, there is the fact that *Mills* struck down a standard instruction prescribed by rule and used in every Maryland capital case for many years. In *Gilmore* v. *Taylor*, 508 U. S. 333, 344-345, n. 3 (1993), a plurality of the Court noted, "The existence of such an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedents by state courts." This is an important point and one worthy of definitive resolution by this Court. New rules which throw out standard practices are disruptive enough when they apply only to cases on direct review, but when they are applied as well to "final" cases, they are nothing short of disastrous. The present case would be a proper one to establish the principle that any decision disallowing a previously standard practice of long standing is a "new rule," at least presumptively if not *per se*.

B. Teague and AEDPA.

The definition of "new rule" under *Teague* remains important after the enactment of the Antitterrorism and Effective Death Penalty Act of 1996 (AEDPA). As this Court held in its previous decision in the present case, *Teague* remains an independent limitation on federal habeas relief. *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*). Where the state court addresses the merits on state collateral review, as in the present case, the *Teague* limitation looks to the state of the law at a different date from the 28 U. S. C. § 2254(d)(1) "clearly established" limitation. Where the state court does not address the merits due to procedural default, the latter limitation does not apply, but *Teague* can still be important. See, *e.g.*, *Breard* v. *Greene*, 523 U. S. 371, 376-377 (1998) (*per curiam*).

In any event, the definition of "new rule" remains important because of its inverse relationship with AEDPA's "clearly established" standard. "[W]hatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law . . .' under § 2254(d)(1)." *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Having been endorsed and codified by Congress, the distinction between new and old rules is more important than ever.

II. The present case demonstrates that the *Mills*/*McKoy* rule requires clarification.

A. Two Kinds of Unanimity.

Concurring in the judgment in *McKoy* v. *North Carolina*, 494 U. S. 433, 455, n. * (1990), Justice Kennedy sounded a note of caution regarding possible misinterpretation of that opinion.

"Indeed, the broad language of today's opinion might be read to suggest that a scheme requiring jury unanimity as to the presence *or absence* of a mitigating factor could violate the Constitution. Such a requirement, however, enhances the reliability of the jury's decision without any risk that a single holdout juror may impose a sentence against the views of the other 11." (Emphasis in original).

The Court of Appeals' interpretation of *Mills* in its first opinion in this case demonstrates that Justice Kennedy's concern was justified. That court apparently understood the rule of *Mills* to be that jury instructions violate the Constitution if "a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance." *Banks* v. *Horn*, 271 F. 3d 527, 546 (CA3 2001). Greater depth of analysis is required. Properly understood, *Mills* does not forbid a bidirectional unanimity requirement.

The problem in *Mills* was the possibility that the jury could have understood its instructions to require it to give no effect whatsoever to any mitigating circumstance on which the jury was divided, and they must proceed to the final decision on the assumption that circumstance was not true. That is not the same as a general prohibition on any unanimity requirement. See *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988). When the jury is not unanimous upon its initial consideration of a mitigating circumstance, there are four possible modes of proceeding:

1. Each juror should proceed to the final decision considering the circumstance if he or she has individually found it true.

2. All jurors should proceed on the premise the circumstance is true.

3. All jurors should proceed on the premise the circumstance is false.

4. The jurors should continue deliberating until they are unanimous, and if they cannot agree report deadlock to the

judge, *i.e.*, exactly the procedure they just finished following for the guilt verdict.

Only number 3 violates the rule of *Mills*. Neither *Mills* nor *McKoy* forbids a state from requiring a jury to continue deliberating until it is unanimous one way or the other. The assumption that *Mills* forbids any kind of unanimity requirement is too simplistic. *Mills* forbids a state from giving a minority of jurors the power to block the others from considering a circumstance they believe is true. The Court of Appeals' analysis completely ignores this distinction.

The instructions in the present case included a sentence not found in the instructions in *Frey* v. *Fulcomer*, 132 F. 3d 916 (CA3 1997): "If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me." *Banks*, 271 F. 3d, at 547. This sentence indicates interpretation 4 above, continue deliberating until unanimous or report deadlock. It flatly contradicts interpretation 3, the *Mills* violation. Yet the Court of Appeals, in apparent reference to this sentence, finds it "even more egregious than in *Frey* regarding the need for the jurors to 'agree' on their 'findings.' " *Id.*, at 547, n. 23.

There is nothing "egregious" or even erroneous about requiring jurors to deliberate until they are unanimous. Such a procedure is entirely in accord with the Anglo-American jury tradition. See *McKoy*, 494 U. S., at 452 (Kennedy, J., concurring in the judgment). That was how the dissent understood the instructions in *Mills*. 486 U. S., at 391-393 (Rehnquist, C.J., dissenting). The *Mills* majority did not dispute that such a procedure would be constitutional; the holding is based entirely on the possibility of a different interpretation. See *id.*, at 378, and n. 11, 383.

The instructions in this case violate the rule of *Mills* only if the possibility of interpretation 3, as distinct from interpretation 4, reaches the "reasonable likelihood" threshold of *Boyde* v. *California*, 494 U. S. 370, 380 (1990). The Court of Appeals

not only failed to appreciate the distinction, it placed an important sentence on the wrong side of the balance. See 271 F. 3d, at 547, and n. 23. Discussing the verdict slip, the Court of Appeals says, "There is also no language anywhere on the form from which the jury could infer that a mitigating circumstance might be marked if only one juror had found that circumstance to exist." *Id.*, at 550. There is also no language anywhere in the Third Circuit's opinion from which we can infer that the court understands that such a procedure is *not* required by *Mills*. That is, the court appears to be completely oblivious to the distinction between the two kinds of unanimity requirements, one valid and one not. This error makes evident the need for further clarification of exactly what *Mills* prohibits and what it allows.

The differences from *Mills* do not stop there. In the present case, there is no need to speculate what the jurors individually found, because the trial judge asked them. The jurors were individually polled on their circumstance findings as well as their final penalty verdict, and every one responded with the same circumstance. *Commonwealth* v. *Banks*, 656 A. 2d 467, 471 (Pa. 1995). The possibility that a "requirement of unanimity" operated to "produce a capital sentence that lacks unanimous support of the jurors," *McKoy*, 494 U. S., at 452 (Kennedy, J., concurring in the judgment), simply is not present in this case. This jury *was* completely unanimous on the mitigating factors. This is not the least bit surprising, since the defense focused on mental illness, its case for that factor was strong, and that is the factor the jury found. See *Commonwealth* v. *Banks*, 521 A. 2d 1, 6-9 (Pa. 1987).

In the wake of *Mills* and *McKoy*, courts and legislatures have adopted the "every juror for himself" approach in the erroneous belief that it is constitutionally required. See, *e.g.*, 18 U. S. C. § 3593(d); Maryland Rule 4-343(h). The result is to subtly undermine the regularity that was the central purpose of the post-*Furman* reforms. In order that those sentenced to death not be a "capriciously selected random handful," *Furman*

v. *Georgia*, 408 U. S. 238, 309-310 (1972) (Stewart, J., concurring), arbitrariness must be restrained in *both* directions. If a circumstance is considered mitigating in one defendant's case and not in the case of another similarly situated defendant, regularity and even-handedness are undermined. The rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and its progeny makes this inevitable to the extent that the definition of "mitigating" can be decided by each jury *as a body*, see *Graham* v. *Collins*, 506 U. S. 461, 494 (1993) (Thomas, J., concurring), but allowing that decision to turn on the idiosyncracies of *individual* jurors greatly aggravates the problem.

This is not idle speculation. Individual jurors have demonstrated some truly bizarre notions of what constitutes mitigation. For example, the case of Steven Oken is a revolting case of sexual assault and murder by a triple rapist/murderer. See *Oken* v. *State*, 790 A. 2d 612, 614-617 (Md. 2002) (Cathell, J., dissenting). Under Maryland's post-*Mills* procedure, at least one juror *actually* found that sexual sadism was a *mitigating* factor! See *Oken* v. *State*, 612 A. 2d 258, 283 (Md. 1992); see also *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring) (claim of "mitigating" circumstance "that the defendant suffers from chronic 'antisocial personality disorder'—that is, that he is a sociopath"). We have idiosyncratic jurors weighing as mitigating those factors which anyone with sense would count as grievously aggravating. This is irrational, arbitrary, and contrary to the principles of *Furman*.

Before legislatures and state courts can move capital sentencing law back in the direction of greater regularity and less capriciousness, this Court must make clear that they are permitted to do so. The states have been so badly whipsawed by shifting doctrine that nothing less than a clear holding will do. This case presents an opportunity for that clear holding. The additional sentence in the instruction to report back in the event of deadlock reduces the possibility of interpretation number 3, the *Mills* violation, below the *Boyde* threshold. The jury poll establishes that this jury was, in fact, unanimous on

the factors. The Court can, in this case, establish the footnote in Justice Kennedy's *McKoy* concurrence as unquestioned law.

B. The Boyde Criterion.

There is a second point which should be clear, but evidently is not. The Court of Appeals in this case relied on *Mills* v. *Maryland* for the proposition that "the critical question is . . . whether a reasonable jury *could* have interpreted the instructions in an unconstitutional manner . . . ." 271 F. 3d, at 544 (emphasis added). *Mills* did indeed say that, as the dissenters so vigorously asserted in *Boyde* v. *California*, 494 U. S. 370, 390 (1990) (Marshall, J., dissenting) ("unequivocally confirmed"). However, the *Boyde* majority found the precedents as a whole less clear and adopted the "reasonable likelihood" standard. *Id.*, at 380. *Mills* is simply no longer good law on this point.

The Court of Appeals in this case was oblivious to the distinction between the *Mills* standard and the *Boyde* standard, and it cited them interchangeably as if they were the same. Indeed, in the very same paragraph in which the court cites the discredited *Mills* standard, it also cites *Boyde*. See 271 F. 3d, at 544.

The difference is important. Enormous amounts of time and resources are expended in the microdissection of capital penalty jury instructions. Three decades after *Furman*, we should expect that all defects in standard instructions which are so *fundamental* as to transgress the Constitution have been found, and that further fine-tuning can be safely left to state courts and legislatures. Yet the process continues in cases such as this one, where an instruction considered perfectly proper at the time of the trial is still being litigated *twenty years* later.

The *Boyde* standard, properly understood and fairly applied, would give states more breathing room and allow most constitutional challenges to standard instructions to be quickly dismissed. The instructions in the present case do not create a

reasonable likelihood that the jury thought any number of jurors less than unanimous could preclude the others from considering a circumstance they continued to believe was true. The jury poll affirmatively demonstrates this did not happen. *Boyde* precludes Banks' claim, but apparently the standard is not sufficiently clear.

III. The Court of Appeals flagrantly evaded the governing habeas statute.

Stubborn resistance to the limits on federal habeas by courts of appeals is not confined to disregard of this Court's precedents. Cavalier disregard of the limits established by Congress is also widespread. On May 19 of this year, this Court unanimously reversed a decision of the Sixth Circuit in which that court recited the rule of 28 U. S. C. § 2254(d) and then completely failed to apply it, deciding the case *de novo* instead. *Price* v. *Vincent*, 538 U. S. __ (No. 02-254, May 19, 2003) (slip op., at 4).

The Court of Appeals' first opinion in the present case is no better. It says,

> "the United States Supreme Court has made it clear that a federal court must apply independent judgment in its interpretation of federal law and if, 'after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail.' " *Banks* v. *Horn*, 271 F. 3d 527, 542, n. 15 (CA3 2001) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 389 (2000)).

The Court of Appeals appears to be oblivious to the fact that this passage is not from the opinion of the Court in *Williams*. It is from part II of Justice Stevens' opinion, which is, in effect, a dissent on this point. The opinion of the Court on this point is part II of Justice O'Connor's opinion, which

emphatically rejects this passage. See *Williams*, 529 U. S., at 403. For the Court of Appeals to cite a major precedent of this Court for exactly the opposite of its actual holding is unsettling, to put it mildly.

Regrettably, the Court of Appeals' opinion in the present case does not stand alone in its embrace of the *de facto* judicial repeal of the statute, which this Court rejected in *Williams*. In *Van Tran* v. *Lindsey*, 212 F. 3d 1143, 1153-1154 (CA9 2000), the Ninth Circuit adopted a "firm conviction" standard, despite the fact that this was precisely the standard proposed in Justice Stevens' opinion in *Williams*, 529 U. S., at 389, and rejected by the majority in that case. The Ninth Circuit applied that standard in *Andrade* v. *Attorney General*, 270 F. 3d 743, 753 (CA9 2001), and this Court reversed. "We have held precisely the opposite . . . ." *Lockyer* v. *Andrade*, 538 U. S. __, 155 L. Ed. 2d 144, 158, 123 S. Ct. 1166, 1175 (2003). The present case is equally flagrant.

Such flouting of both an Act of Congress and this Court's precedent by a court of law is intolerable. Beyond question, in this case "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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